buildings, they are largely of corrugated iron covered with cloth, though in some instance Chinese tiles which would, of course, be of a more permanent character, have been substituted for corrugated iron. This evidence as to the materials and the method of construction used for these buildings is not challenged at all by the respondent and in my view it is clear from the evidence of these experts that the buildings are of a temporary character. If there were any doubt about it one has only to look at the photographs. They show that these buildings are a lot of shacks and provide abundant confirmation of the evidence given by the architect, Mr. Doffet, that "the whole nature of the construction is of a type not intended to last very long". It may be that the persons who live in these buildings have to make them their home. Many people, unfortunately, have to make their homes in shacks but that does not make them buildings of a permanent character; nor does it affect the question whether they are buildings of a temporary character within the meaning of this provision of the Ordinance. I have no doubt whatever that the buildings on this site which are the subject matter of this action are buildings of a temporary character within the meaning of paragraph (i) of sub-section (1) of section 15.

As regards the other requirement of that paragraph, namely, that the landlord desires possession order to erect permanent buildings in accordance with plans approved by the local authorities, this was not the subject of any argument and I take it is not contested that those conditions are fulfilled. In these circumstances, therefore, I am very clearly of the opinion that the judgment of the learned District Judge was wrong and that the appellants are entitled to judgment in this case. It is not necessary, in view of this finding, to consider the additional ground relied upon by the landlord that in any event these buildings are in such a condition that it is necessary in the interests of public health or town improvement that they should be demolished. I allow this appeal and give judgment for the plaintiffs for possession with costs, such costs to include the costs of the motion which I heard before the commencement of the hearing of this case.

Appeal allowed.

Solicitors: *Sisson & Delay; Donaldson & Burkinshaw.*

E. E. LEIGH v. HEAH JOO SEANG RUBBER ESTATE LTD.

[O. C. J. (Hepworth J.) November 9, 1957]

[J. B. — Civil Suit No. 9 of 1957]

Master and Servant — Commission promised — Basis and rate to be decided by discussion — Death of servant before discussion — Reasonable remuneration.

Companies — Contract — Commission — Promise to pay rubber estate manager on percentage basis — Basis and rate.

The plaintiff in this case was one of the executors of the deceased. The defendants by a letter dated November 24, 1952 offered and the deceased accepted employment with them on the terms and conditions set out in the said letter. A paragraph in the said letter under the heading "Commission" read: "This will be paid on a percentage basis on the net profits of the Company before deduction of depreciation on fixed assets, replanting Expenditure and Income Tax, but excluding income from any investments and monies on deposit. The percentage rate of this commission will be decided by discussion between the General Manager, the Owners and yourself." The deceased commenced employment on December 7, 1952 and continued to be employed by them until he was killed on March 13, 1955 by terrorists. The discussion mentioned under the paragraph "Commission" never took place during the lifetime of the deceased. The issues to be decided were: (a) Was commission payable to the plaintiff? and (b) If so, at what rate?

Held: (1) the plaintiff in this case was entitled to reasonable remuneration, and accordingly the Court would not supply the figure for "the percentage rate of commission" in the paragraph headed "Commission" in the said letter, but would decide what reasonable remuneration the plaintiff was entitled to or indicate the manner in which such reasonable remuneration was to be ascertained;

(2) in this case the reasonable commission to be paid by the defendants to the deceased for the periods in question could be ascertained by taking figures representing 1½% of the net profits of the Company during such periods.

Cases referred to:—

(1) *Taylor v. Brewer* 1 M. & S. 290.
(2) *Roberts v. Smith* 4 H. & N. 315.
(3) *Bryant v. Flight* 5 M. & W. 114.
(4) *Broome v. Speak* (1903) 1 Ch. 586.
(5) *Loftus v. Roberts* 18 T.L.R. 532, 534.
(6) *Powell v. Braun* (1954) 1 All E.R. 484.
(7) *Way v. Latilla* (1937) 3 All E.R. 759.
(8) *Obu v. A. Strauss & Co. Ltd.* (1951) A.C. 243.

CIVIL SUIT.

K. Gould for the plaintiff.

J. E. Lloyd for the defendants.

Hepworth J.: — The plaintiff is one of the executors of the Estate of Kenneth Douglas Paul deceased (referred to hereinafter as "the deceased") having been appointed by the deceased by his Will dated 19th October, 1947, Probate of which was on the 17th August, 1955, resealed at Johore Bahru in Resealing Probate No. 11 of 1955.

The defendants are a limited Company incorporated in the Federation of Malaya, and are the owners of certain rubber estates situated in Pengerang, Johore.

By a letter dated the 24th November, 1952, (referred to hereinafter as "the said letter") the defendants through their then agents, Harper Gilfillan & Company Limited, offered and the deceased accepted employment with the defendants on the terms and

conditions set out in the said letter. A paragraph in the said letter under the heading "Commission" reads :-

"This will be paid on a percentage basis on the nett profits of the Company before deduction of depreciation on fixed assets, replanting Expenditure and Income Tax, but excluding income from any investments and monies on deposit. The percentage rate of this commission will be decided by discussion between the General Manager, the Owners and yourself."

The deceased commenced employment with the defendants on the 7th December, 1952, and continued to be employed by them until he was killed on the 13th March, 1955, at Pengerang Estate, Johore, by terrorists. All the above facts were admitted by the defendants.

The plaintiff alleged that, in spite of repeated requests made by the deceased during his lifetime to the defendants their servants or agents, the percentage rate of the commission due to him under the terms of the paragraph of the said letter referred to above was not decided by discussion or otherwise and no commission had been paid to him at the date of his death. The plaintiff claimed an account of the commission due and payable to the deceased for the period 7th December, 1952, to 13th March, 1955, inclusive, stating that on a reasonable basis the rate of commission payable should be 2½%.

The defendants denied that the deceased had repeatedly requested a decision as to the percentage rate of commission due to him during his lifetime, and said that no discussion as to the percentage rate of commission had taken place between the General Manager, the defendants and the deceased or his Estate. The defendants also denied that they were liable to pay the plaintiff commission at the rate claimed by him or at all.

Alternatively the defendants pleaded that the paragraph as to commission in the said letter was void for uncertainty and denied that they were liable to pay the plaintiff commission at the rate claimed or at all.

Further in the alternative the defendants said that there was no consideration for the agreement to pay commission.

Further the defendants pleaded in the alternative that if they were liable to pay the plaintiff at all (which they denied), they were only liable to pay :—

(a) In respect of the year 1953 a sum of $2,670 which they had paid to the Chartered Bank (Malaya) Trustee Limited on behalf of the plaintiff;

(b) In respect of the year 1954 a sum of $4,420 which had been tendered to but refused by the Chartered Bank (Malaya) Trustee Limited on behalf of the plaintiff and had been paid into Court;

(c) In respect of the periods 7th December, 1952, to 31st December, 1952, and 1st January, 1955, to 13th March, 1955, a sum of $1,576.14.

The defendants further stated in the alternative that if they were liable to pay the plaintiff at all (which they denied) they denied that on a reasonable basis the rate of commission payable should be 2½%. They alleged that a reasonable basis was one half of one per cent.

The issues simply were: (a) Was commission payable to the plaintiff? and (b) If so, at what rate? It was agreed by both parties that the question of the figures of profit upon which such commission would be calculated could be disregarded for the time being until a decision had been given on the two issues stated

Where it is agreed that it shall be left to the employer to determine whether or not remuneration is to be given for any particular service and he decides against any such payment, no remuneration is recoverable. (*Taylor v. Brewer*[1], *Roberts v. Smith*[2]). But when a contract of service which leaves the question of remuneration to the employer is capable of being considered as an agreement to pay a reasonable sum for the service in question, the servant is entitled to something in the way of payment (*Bryant v. Flight*[3]), In the case of *Broome v. Speak*[4] Buckley J. at p. 599 referring to those 3 cases says :—

"Now all those cases were considered that other day in the Court of Appeal in Loftus v. Roberts[5], and Vaughan Williams L.J. sums them up by saying this: 'The decision in the first of these cases and in the third, and the dissentient view of Parke B. in the second, was this — that wherever words which by themselves constituted a promise were accompanied by words which shewed that the promisor was to have a discretion or option as to whether he would carry out that which purported to be the promise, the result was that there was no contract on which an action could be brought at all. The doctrine was an old one. In Leake on Contracts, 3rd ed. p. 3, it was expressed thus: Promissory expressions reserving an option as to the performance do not create a contract.'"

On consideration of the paragraph headed "Commission" in the said letter in the light of the cases referred to above which show the manner in which the Court should approach cases of this kind, it seems to me clear that the parties did not intend the payment of this commission to be purely discretionary. Nor do I think that this paragraph in its terms and character too vague and general to be capable of supporting a claim. Having decided that the paragraph is not too vague and that the payment of the commission was not intended to be discretionary, the following words of Sir Raymond Evershed, M.R., in *Powell v. Braun*[6] (at p. 486) are appropriate :—

"Once it is concluded that this was not to be a reward in the discretion of the defendant, then, inevitably, it must be taken that the sum to be paid — unless the parties chose from time to time to agree some other figure — would be a reasonable sum, that is, a sum arrived at so as to bear a reasonable relationship to the trading profit. If there were no trading profit, no doubt, there would be no so-called bonus, but, in any other event, I think the principle of quantum meruit or of reasonable remuneration (which comes to the same thing) is no less applicable

where the remuneration in question is additional remuneration — that is, over and above the fixed salary — than it is where the basic remuneration is the only remuneration."

Denning L.J., in the same case said :—

"I think the defendant plainly bound himself to pay something. The precise amount would not be an amount in his unfettered discretion. It would be an amount within his reasonable discretion, that is, it would be the amount which a fair and just man would pay in the exercise of a reasonable discretion."

Romer L.J. in the same case said :—

"In my view, it was a matter of a legal bargain giving rise to a legal right, and the plaintiff was to get at all events something, provided there were profits. I think the case is covered by the type of authority exemplified by Taylor v. Brewer[1] and Way v. Latilla[7], and I agree that the plaintiff should be remunerated on a *quantus meruit* or reasonable basis in the way that Sir Raymond Evershed, M.R., has indicated."

Two further cases were cited : the case of *Obu v. Strauss & Co. Ltd.*[8] in which the question of the commission was left entirely to the Company and the Court held that it could not determine the basis and rate of the commission because to do so would involve not only making a new agreement for the parties but varying the existing agreement by transferring to the Court the exercise of a discretion vested in the respondents; and the case of *Way v. Latilla*[7] where it was held that there was no concluded contract between the parties as to the amount of the share or interest that the appellant was to receive, and it was impossible for the Court to complete the contract in this respect, but that there was a contract of employment between the parties, which clearly indicated that the work was not to be done gratuitously, and the appellant was therefore entitled to a reasonable remuneration on the implied contract to pay him a *quantum meruit*.

Mr. Lloyd submitted that there was no consideration for the agreement to pay commission. But the paragraph as to "Commission" in the said letter formed part of the contract from the beginning and it seems to me that there was clearly consideration for the contract.

The plaintiff in this case is therefore entitled to reasonable remuneration and accordingly the Court will not supply the figure for "the percentage rate of commission" in the paragraph headed "Commission" in the said letter, but will decide what reasonable remuneration the plaintiff is entitled to or in which such reasonable remuneration is to be ascertained.

It therefore remains to be decided what was reasonable remuneration in the circumstances of this case.

Evidence was given by PW1 and PW3, both planters of considerable experience, and by PW2, an employee of Messrs. Harper Gilfillan & Co., Ltd. in the agency business of that firm, all of whom stated that the rate of commission usually payable varied from estate to estate because it depended on a number of factors, such as the size of the estate, the type and quality of rubber trees (that is, productivity of the property), in recent years the situation of the estate, the responsibility, age and experience of the Manager concerned, and the number of Managers employed on the whole property. It was also stated that the rate of commission was usually higher on a poor estate than on a good estate, and that in general terms the rate of commission paid varied from between 2½% on a good estate to 6% on a poor estate.

The reason why no specific rate of commission was stated in the said letter was that the property had previously been managed by the Custodian of Enemy Property and the new owners, the defendants, at that time considered the production and profits of the estate were not as great as would have been the case under prudent commercial management, and therefore any rates of commission fixed as a percentage of the figures of past profits might be disproportionate when the estates were being operated in a fully commercial manner.

PW1 who was employed as General Manager by the defendants' Group of Estates was paid a commission of 2½% on the gross earnings of the Group, but it was apparent from the evidence that this was a most unusual commission to pay and can therefore for the purpose of computing a reasonable percentage in this case be disregarded.

PW1 gave it as his opinion that a reasonable commission payable to the Manager of Pengerang and Santi Estates, which were the estates in the Group managed by the deceased, would be either 2½% on the gross earnings of those estates or 1¼% on the gross earnings of the whole Group.

PW2 stated that in his opinion a reasonable rate of commission to the Manager of Pengerang and Santi Estates would be between 4½ to 5% on the net earnings of these estates, or 2 to 2½% on the net earnings of all the Group Estates. He stated that by net earnings he meant net earnings as defined in the paragraph in the said letter under the heading "Commission".

PW3 stated that in his opinion a reasonable rate of commission would be 4½ to 5% on the net earnings of Pengerang and Santi Estates, or 2¼ to 2½% on the net earnings of all the Group Estates. This witness stated that by net earnings he meant the amount of profit made net before deducting depreciation, replanting and tax.

The figure for the Group is half that for Pengerang and Santi Estates because for practical purposes the net profit derived from Pengerang and Santi Estates is half the total net profit of all the Group Estates.

No evidence was called on behalf of the defendants.

PW2 stated that he would classify Pengerang as a poor estate and Santi as a medium estate in 1952 which is the beginning of the period with which we are concerned. It would therefore appear that a reasonable rate of commission would be 5% on the net earnings of Pengerang and Santi Estates, or 2½% on the net earnings of all the Group Estates. There was however a General Manager for the Group and his rate of commission should be deducted from this percentage. Evidence was given that the Manager during the whole of the period with which we are concerned was a Mr. Miles who was paid 1½% of the net profits of the Group. Therefore the figure of 5% will have to be reduced by 1½ to 3½%, and the figure of 2½% will have to be reduced by ¾ to 1¾%. The deceased was the only Manager of Pengerang and Santi Estates and therefore in my opinion it is reasonable that he should have been paid a commission of 3½% on the net earnings of Pengerang and Santi Estates, or 1¾% on the net earnings of the Group (on the basis that the net earnings of Pengerang and Santi Estates constitute more or less half the net earnings of all the Group Estates).

It was submitted for the defendants that a number of Managers had been employed by them at figures of from .2% to .6% commission and that therefore the commission which had been either paid or offered to the deceased's Estate was sufficient. I do not think the fact that these rates of commission had been acceptable to certain individuals in any way negatived the expert evidence of PW1, PW2 and PW3 as to the general rates of commission payable throughout the industry. The circumstances of an individual can be relevant in determining the amount of salary and commission which that individual is prepared to accept

The paragraph headed "Commission" in the said letter referred to the net profits of the Company (that is the Group) and set out what was meant by net profits. I hold therefore that reasonable commission to be paid by the defendants to the deceased for the periods in question can be ascertained by taking figures representing 1¾ per centum of the net profits of the Company during such periods.

Order accordingly.

Solicitors: *Rodyk & Davidson; Drew & Napier.*

TAN KOOI NEOH v. CHUAH TYE IMM

[A. C. J. (Rigby J.) November 20, 1957]
[Penang — Civil Appeal No. 5 of 1957]

Workmen's compensation — Death of member of crew of junk in wreck — Whether deceased was workman or co-adventurer — Coastal traders — Evidence of custom — Arbitration — Unsworn statements made in absence of parties — Admission.

Mercantile law — Evidence of custom — Coastal traders — "Kongsi" on a venture on a profit sharing basis.

In this case the respondent claimed workman's compensation on the death of her husband who was employed as a members of the crew of a junk which was wrecked. The principal question at issue was whether the deceased was a workman or whether he and the other members of the crew of the junk were partners with the taikong in a joint venture. The arbitrator held that the deceased was a workman but in so deciding relied on the unsworn statements of three members of the crew made to a labour officer.

Held: (1) the onus of proof of establishing that her husband was a workman and therefore entitled to compensation under the Workmen's Compensation Ordinance was upon the respondent:

(2) the fact that the arbitrator had acted upon and treated as evidence unsworn statements made in the absence of the parties and without an opportunity to cross-examine on such statements was a mistake of law and therefore the appeal must be allowed and a new inquiry ordered before another arbitrator.

WORKMEN'S COMPENSATION.

R. D. Hume for the appellant.

M. Abraham for the respondent.

Rigby J. : — This is an appeal from a decision of the learned President of the Sessions Court sitting as an Arbitrator under the Workmen's Compensation Ordinance, 1952.

No appeal lies from such a decision except on questions of law. The appeal comes before the High Court upon a certificate given by me under section 39(2) of the Ordinance that the decision of the Arbitrator involves a question of law which it is desirable in the public interest to have determined by the High Court.

The application for a certificate was made to me by way of Originating Motion. Of necessity it was supported by an affidavit and by copies of certain relevant documents. Neither the grounds of decision of the learned Arbitrator nor the notes of evidence taken by him were before me. The reason for this was that when the present appellant applied for a certified copy of the notes of evidence for the purpose of appealing against the decision she was informed by the Registrar of the Sessions Court, in writing, that since no right of appeal existed except on a point of law it was regretted that her request for a certified copy of the notes recorded during the course of the inquiry could not be granted.

On the face of the application itself and the supporting affidavit and enclosures I was certainly of